BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. A-5873

APPEAL OF HABIB AND TAHEREH SAFARI AHMADIZADEH

OPINION OF THE BOARD

(Hearing held May 21, 2003)
(Effective Date of Opinion: November 21, 2003)

Case No. A-5873 is an administrative appeal filed by Habib and Tahereh Safari Ahmadizadeh (the "Appellants"). The Appellants charge error on the part of the County's Department of Permitting Services ("DPS") in revoking Building Permit No. 284827, issued on November 21, 2002, for the construction of a single-family dwelling on the property located at 8037 Park Lane, Bethesda, Maryland (the "Property").

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on the appeal on May 21, 2003. Stephen J. Orens, Esquire, and Kinley R. Dumas, Esquire, represented the Appellants. Assistant County Attorney Malcolm Spicer represented DPS. Jim Levin and Yves Pommier, adjoining property owners, intervened.

Decision of the Board: Administrative appeal **denied**.

FINDING OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 8037 Park Lane in Bethesda, is an R-60 zoned parcel identified as Lot 10, Block G of the Battery Park subdivision. On November 21, 2002, DPS issued Building Permit No. 284827 to Mr. Ahmadizadeh to permit the construction of a single family dwelling on the Property. Thereafter, the Appellants submitted to DPS revisions to the building

plans, which DPS approved. DPS issued a revised Building Permit No. 294645 on December 30, 2002.

2. On February 25, 2003, DPS sent a letter to the Appellants notifying them that Permit No. 284827 and all revisions thereto were revoked. The letter states that "this action is taken as we believe the height violates the provisions of Section 59-C-1.327(a) of the Zoning Ordinance as the proposed building would exceed 2½ stories." The Appellants noted a timely appeal.

3. Mr. Curt Schreffler, whom the Board qualified as an expert in civil engineering and land planning, testified that the plans for the proposed house were for a traditional-style, two-story home with a cellar. He stated that the cellar floor was anticipated to be located at an elevation of 372.2 feet. The cellar ceiling elevation would be measured at 380.4 feet. Based on these measurements, the midpoint elevation of the cellar would therefore be 376.3 feet. The perimeter of the planned house measures 205.2 linear feet. Mr. Schreffler then stated that, based upon the site plan (Exhibit 10) and elevations (Exhibit 11) submitted, 64% of the perimeter of the house, or 131 linear feet, would be located below the proposed grade and above the midpoint of the cellar height.[1]

4. As an alternative method of measurement, Mr. Schreffler calculated the total area of the cellar wall by multiplying the proposed height of the cellar (8.2 feet) by the length of the perimeter (205.2 feet), which results in a total area of about 1,682 square feet. Mr. Schreffler testified that 862 square feet, or 51.2%, of the area of the cellar wall would be below grade. Mr. Schreffler stated that the discrepancy between the two methods of calculation results from the fact that the proposed garage entrance is partially below grade.

5. Mr. Schreffler testified that the height of the proposed structure would be 33.95 feet, measured from the top of the curb in front of the house (373.05 feet) to the mean point between the peak and the eaves of the house (407.9 feet).[2] Mr. Schreffler testified that in his experience the County routinely accepts a height measurement taken from the top of the curb. If measured from the crown of the roadway (372.85 feet), the height of the proposed structure would be 35.05 feet. Mr. Schreffler testified that if the crown of the roadway is determined to be the required measuring point, the house could be lowered by 2 or 3 inches to comply with the 35-foot height maximum.

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[1]On examination by Ms. Fultz, Mr. Schreffler stated that he determined the mean level of the adjacent ground based only upon the spot elevations at each corner of the structure. He admitted that this method of calculation does not provide a precise measurement of the *mean* level of the adjacent ground. He stated, however, that because the adjacent grade in this case is relatively constant, the result closely approximates the mean grade.

[2]Assuming the elevations are correct, the actual height of the proposed building would be 34.85 feet.

6. On cross-examination, Mr. Schreffler stated that the existing average grade on the Property prior to construction is 374 feet. The contractor will raise the grade by 2.5 feet so that the finished average elevation will be 376.5 feet. Mr. Schreffler admitted that if the building was constructed on the existing grade, then the lower level of the house would qualify as a basement rather than a cellar under the Zoning Ordinance. He stated that the grade will be increased in order to provide positive drainage away from the house and to cover the foundation. In response to questioning, he admitted that the County building code requires a slope away from the foundation of only 6 inches in the first ten feet. The proposed grade will significantly exceed this minimum requirement. He also admitted that meeting the height requirement is "indirectly" one of the reasons for raising the grade.

7. Ms. Susan Scala-Demby, Permitting Services Manager for DPS, testified that upon reviewing the plans for the Property, she determined that the Appellant proposed to raise the grade around the house 2.5 feet solely for the purpose of qualifying the lowest level as a cellar rather than as a basement, thereby circumventing the height restriction of the Ordinance. She stated that in her 15 years of experience, DPS has consistently interpreted the height limitation of Section 59-C-1.327(a) as requiring that the height of a building may not exceed both 2½ stories and 35 feet.

8. The parties provided a legislative history of the zoning provisions that establish the height restrictions for main buildings in the R-60 zone. The 1955 Montgomery County Code provided:

> "The height limit for a main building shall be two and one-half stories, but not over thirty-five feet, except that the height limit may be extended to three stories, but not over forty feet, if each side yard is increased in width one-half foot, for each additional one foot of height. The height limit for accessory buildings shall be two stories but not over twenty-five feet." Section 107-8.f, 1955 Montgomery County Code (Exhibit 17).

As of December 31, 1977, the Code stated:

> "For a main building in the [R-40, R-60, and R-90] zones ... the height shall not exceed two and one half stories nor thirty-five feet; except that if each side yard is increased by one-half foot for each additional foot of height, this may be increased to not more than three stories nor forty feet." Section 59-C-1.327, 1972 Montgomery County Code, 1977 Replacement Volume (Exhibit 16).

In 1987, the Montgomery County Council, sitting as the District Council, enacted Zoning Text Amendment No. 870004 (Ordinance N. 11-6) which, among

other things, revised the height limit for main buildings in the R-90, R-60 and R-40 zones to read as follows:

> "For a main building in the [R-90, R-60, and R-40] zones ... the height shall not exceed 35 feet except as follows:
>
> a. The height must not exceed 2 ½ stories or 35 feet if other lots on the same side of the street and in the same block are occupied by buildings with a building height the same or less than this requirement.
>
> b. The height may be increased to either three (3) stories or 40 feet if approved by the Planning Board through the site plan approval procedures of Division D-3." Section 2 of Ordinance 11-6 (Exhibit 15A).[3]

The Council's Opinion on the amendment, which is part of Exhibit 15A, states that the amendment was introduced at the request of the Suburban Maryland Building Industry Association. The Opinion further states that the Montgomery County Planning Board supported the intent of the amendment "to provide some additional flexibility in the height of buildings that may be constructed in the R-90, R-60 and R-40 zones." The Council noted that the Planning Board's position was tempered, however, in that "this additional flexibility must not be allowed in situations where a building height above 2½ stories will adversely affect surrounding, developed residential properties."

The Opinion notes that the Department of Environmental Protection ("DEP") recommended that, for ease of enforcement, the 2½ story limitation be eliminated in favor of a height standard expressed solely in terms of feet.

The recommendations of the Planning Board and DEP were considered by the Council's Planning, Housing and Economic Development Committee, which held public hearings on the text amendment. According to the Council's Opinion:

> "The Committee generally agreed that it would be useful to simplify the method for establishing the allowable height of residential structures in the R-90, R-60, and R-40 zones. Use of the 2½ story standard was judged by the Committee to be cumbersome, impractical, and without any real useful purpose. The Committee, however, recognized the need to limit building height of new residential construction on older developed areas for compatibility purposes. The Committee recognized the problem identified by the

[3]This is the same language that exists today, except that the word "than" in subsection "a" appears as "that" in the codified Zoning Regulation - presumably a publisher's error.

> home building industry that the 2 ½ story limitation now in effect limits the opportunity for garage units in lower levels and for walk-out basements."

The Opinion then explains that while it was the Committee's desire to adopt a height standard without reference to a story limitation, the Committee decided to ask the Planning Board for a report and recommendation on a "more comprehensive solution to the height issue." The Committee therefore recommended approval of the Planning Board's proposed revisions, including the language of Section 50-C-1.327.a, "as an interim measure." The Council agreed and adopted the amendment as proposed. The provision has not been subsequently amended.

CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-43.(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that the building permit was properly revoked.

2. There is little dispute as to the facts or applicable law of the case. Both parties agree that the maximum allowable height of the proposed structure is governed by Section 59-C-1.327.a of the Zoning Ordinance, which states:

> "The height must not exceed 2½ stories or 35 feet if other lots on the same side of the street and in the same block are occupied by buildings with a building height the same or less that (sic) this requirement."

The parties also agree that, if the lower level of the proposed house qualifies as a "basement," it must be counted as a "story" for the purposes of the height restriction of Section 1.327.a. Section 59-A-2.1. The two sides also agree that a "basement" is defined in Section 59-A-2.1 as:

> "That portion of a building below the first floor joists at least half of whose clear ceiling height is above the mean level of the adjacent ground."

Additionally, both parties agree that the proposed dwelling will not exceed 35 feet in height.[4] The parties also agree with the figures offered by Mr. Schreffler with regard to the measurement of the lower level of the proposed house. What's more, both agree that if the mean level of the adjacent ground is measured from the existing grade, rather than the finished grade, then the lower level of the proposed house will constitute a "basement" and therefore a story within the meaning of the Zoning Ordinance .

3. The parties diverge, however, on two points: (1) whether the mean level of the adjacent ground is to be measured from the existing or finished grade, and (2) whether the proposed dwelling must be no more than 2½ stories. The first question is a mixed issue of fact and law; the second issue is strictly a matter of statutory interpretation.

Section 59-A-2.1: Making the "Grade"

4. The County contends that, in this case, the lower level of the proposed dwelling should properly be measured from the existing grade of the Property, and not from the proposed finished grade. The County argues that the Appellants improperly proposed to artificially raise the grade of the adjacent ground by 2½ feet for the sole purpose of avoiding the height requirement.

The Board agrees. We think that an applicant for a building permit ought not to be allowed to circumvent the statutory height requirements of the Zoning Ordinance by unnecessarily increasing the grade of the adjacent ground. To do so could lead to absurd results. For example, an applicant could build a 3½-story structure, pack 10 or more feet of dirt around the lower level, and claim to have a 2½ story home. This is certainly beyond the clear intent and purpose of the "basement" and "story" requirements, which is to regulate not only the height but also the appearance of certain residential structures. Where a person's action is intended solely for the purpose of circumventing a statute, that person may be held to the proscriptions of the statute. See, e.g., Ross v. State, 117 Md. App. 357, 700 a.2d 282 (1997); Curley v. State, 299 Md. 449, 474 A.2d 502 (1984); District Heights Apartments v. Noland Co., 202 Md. 43, 95 A.2d 90 (1953); Snodgrass v. Immler, 232 Md. 416, 194 A.2d 103 (1963).

While we have no doubt, as Mr. Schreffler testified, that there may be various other potentially legitimate reasons for increasing the grade adjacent to a house, none of those reasons applied here. The record indicates that a 2½-foot increase in grade was not needed for drainage. There is nothing in the record to

[4]If measured from the crest of the roadway the house may slightly exceed 35 feet. Because the Appellants agreed that any such discrepancy must be corrected, the Board will presume, for the purposes of this Opinion, that the dwelling does or will meet the 35-foot height maximum.

suggest that the 2½- foot increase in grade was provided in this case for aesthetics or for any other reason. Rather, it appears from the record that the sole reason for increasing the grade by 2½ feet was to avoid defining the lower level as a "basement" and therefore a "story" for the purpose of the height restriction.

In this case, then, the proper measure of the "mean level of the adjacent grade" was from the existing grade, not from the proposed finished grade. Consequently, based on this measure, the proposed lower level constituted a "basement," and therefore a "story," for the purposes of Section 59-C-1.327.a.[5]

Section 59-C-1.327.a: It All Depends on What "Or" is

5. The Appellants alternatively contend that, even if the proposed dwelling is more than 2½ stories, it nonetheless meets the height requirement of Section 59-C-1.327.a because it is no more than 35 feet high. The Appellants argue that the language of the provision requires only that the Appellants meet one of the two stated tests - that is, that the house may be either (a) no more than 35 feet tall, or (b) no more than 2½ stories high. In this case, because the house meets the 35-foot test, the Appellants claim, the "story" test does not apply.

The Appellants root their argument on two grounds: (1) that the Council used the disjunctive "or" to establish the test for height limitation, and (2) that in enacting the language, the Council expressed a need for "simplification" and "flexibility" in the height standard.

The County argues, oppositely, that Section 59-C-1.327.a sets up a two-part test for height, such that the Appellants must meet both the 35-foot and 2½ story limitations. The County contends that the legislative history and the long-standing administrative interpretation of this regulation support its position.

6. In The Mayor and Council of Rockville, et al v. Rylyns Enterprises, Inc., 372 Md. 514 (2003), the Maryland Court of Appeals set out the six oft-cited principal tenets of statutory interpretation:

> "[1] The cardinal rule of construction of a statute is to ascertain and carry out the real intention of the Legislature.

[5]This is not to suggest, and DPS should not interpret it so, that henceforth all residential building plans should be measured from existing grade. The Board's conclusion is limited to the facts of this case, in which we find that the grade was increased artificially and for the sole purpose of circumventing the regulations. We think that DPS should continue to interpret and apply the regulation on a case-by-case basis according to the particular facts.

[2] The primary source from which we glean this intention is the language of the statute itself.

[3] In construing a statute, we accord the words their ordinary and natural signification.

[4] If reasonably possible, a statute is to be read so that no word, phrase, clause, or sentence is rendered surplusage or meaningless.

[5] Similarly, wherever possible an interpretation should be given to statutory language which will not lead to absurd consequences.

[6] Moreover, if the statute is part of a general statutory scheme or system, the sections must be read together to ascertain the true intention of the Legislature." (citations omitted).

Id., at 549-50.

The Court in *Rylyns* reiterated when recourse to legislative history is necessary, stating that:

"Of course, the cardinal rule is to ascertain and effectuate legislative intent. To this end, we begin our inquiry with the words of the statute and, ordinarily, when the words of the statute are clear and unambiguous, according to their commonly understood meaning, we end our inquiry there also.

* * * * * *

We have acknowledged that, in ascertaining a statute's meaning, we must consider the context in which a statute appears. In this regard we have instructed [that] when the statute to be interpreted is part of a statutory scheme, it must be interpreted in that context. That means that, when interpreting any statute, the statute as a whole must be construed, interpreting each provision of the statute in the context of the entire statutory scheme. Thus, statutes on the same subject are to be read together and harmonized to the extent possible, reading them so as to avoid rendering either of them, or any portion, meaningless, surplusage, superfluous or nugatory. (citations omitted).

On the other hand, "where the meaning of the plain language of the statute, or the language itself, is unclear, 'we seek to discern legislative intent from surrounding circumstances, such as legislative history, prior case law, and the purposes upon which the statutory framework was based.'" We recently explained the rules applicable when the terms of a statute are ambiguous:

> 'When the words of a statutory provision are reasonably capable of more than one meaning, and we examine the circumstances surrounding the enactment of a legislative provision in an effort to discern legislative intent, we interpret the meaning and effect of the language in light of the objectives and purposes of the provision enacted. Such an interpretation must be reasonable and consonant with logic and common sense. In addition, we seek to avoid construing a statute in a manner that leads to an illogical or untenable outcome.'

We defined the term "ambiguity" as "reasonably capable of more than one meaning," and further explained that:

> 'language can be regarded as ambiguous in two different respects: 1) it may be intrinsically unclear . . .; or 2) its intrinsic meaning may be fairly clear, but its application to a particular object or circumstance may be uncertain.' Thus, a term which is unambiguous in one context may be ambiguous in another."

Id. at 550-52 (Internal citations omitted).

7. Applying these tenets of statutory construction to the language of Section 59-C-1.327.a, it is apparent that a plain meaning approach does not yield a ready answer. The Appellants argue that "or" necessarily denotes an option or choice between two alternatives. This is not always the case. Black's Law Dictionary provides:

> "The word 'or' is to be used as a function word to indicate an alternative between different or unlike things. In some usages, the word 'or' creates a multiple rather than an alternative obligation; where necessary in interpreting an instrument, 'or' may be construed to mean 'and.'"

Black's Law Dictionary 568 (5th ed. 1983).

The courts have recognized that the words "or" and "and" are often used ambiguously:

> "There has been, however, so great a laxity in the use of these terms that courts have generally said that the words are interchangeable and that one may be substituted for the other, if consistent with the legislative intent."

Sutherland Statutory Construction § 21.14 (4th Ed.).

Maryland is one of the states that has adopted this view:

> "It is well settled that the terms 'and' and 'or' may be used interchangeably when it is reasonable and logical to do so."

Little Store, Inc. v. State, 295 Md. 158, 163 (1983).

Because the word "or" in Section 59-C-1.327.a is reasonably capable of more than one meaning, our recourse is to the legislative history of the provision and the statutory framework in which it was enacted.

8. There is no dispute that, from 1955 to 1987, the test for the height of a main building in the R-60 zone required that the building be both no more than 2½ stories and no more than 35 feet. It is apparent that, in 1987, there was a movement afoot to eliminate the "story" prong of the test, leaving only a measurement expressed in feet. It is equally apparent that this movement only partially succeeded. The 35-foot only height limitation was instituted under Ordinance 11-6 for all main buildings with one exception - those located on lots "on the same side of the street and in the same block [as lots that] are occupied by buildings with a building height the same or less than this requirement." It is clear from its Opinion that the Council intended this exception to apply to "older developed areas."

The Appellants argue that the exception to the 35-foot only requirement was instituted to provide "flexibility" for builders. To the contrary, we read the Council's Opinion as expressing a clear intent to restrict building height in established communities, not to provide greater flexibility. Flexibility was the goal of the general 35-foot only limitation; the exception, however, was aimed at ensuring compatibility of both the height and the appearance of homes in older neighborhoods.[6] The Council quoted with affirmation the Planning Board's admonition that "this additional flexibility must not be allowed in situations where a building height above 2½ stories will adversely affect surrounding, developed residential properties." Likewise, the Council referred to the Committee's belief that while the "use of the 2½ story standard was judged by the Committee to be cumbersome, impractical, and without any real useful purpose .... [t]he Committee, however, *recognized the need to limit building height of new residential construction on older developed areas for compatibility purposes*." The Council adopted without change the positions of the Planning Board and the Committee.

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[6]Flexibility is also provided under Section 59-C-1.327.b, an exception to the exception, which allows an increase in the height of a building located in an existing community if approved through the site plan approval process.

We believe the Council's Opinion evinces a clear legislative intent that Section 59-C-1.327.a sets up a two-part test for height of main buildings in an R-60 zone, such that a building must meet both the 35-foot and 2½ story limitations. We believe this interpretation is also more reasonable and consonant with logic and common sense. If we were to adopt the Appellants' interpretation, an unwelcome scenario might occur - while a builder in a new subdivision would be limited to building a home 35 feet in height, a builder in an established neighborhood could construct a house 50 feet tall as long as the house remained 2½ stories. This, we suggest, is an absurd result that is contrary to the statutory scheme of the Ordinance to provide uniformity and consistency in land use. We will therefore seek to avoid construing the statute in a manner that "leads to an illogical or untenable outcome."

9. Our conclusion is buttressed by the long-standing administrative interpretation of the statute by DPS. The consistent and long-standing construction given a statute by the agency charged with administering it is entitled to great deference, Harford County People's Counsel v. Bel Air Realty Associates L.P., 148 Md. App. 244, 811 A.2d 828 (2002); Balto. Gas & Elec. v. Public Serv. Comm'n, 305 Md. 145, 161-62, 501 A.2d 1307, 1315 (1986), as the agency is likely to have expertise and practical experience with the statute's subject matter. See, e.g., Sinai Hosp. v. Dept. of Employment, 309 Md. 28, 46, 522 A.2d 382, 391 (1987); 2B N. Singer, Sutherland Statutory Construction, § 49.05, at 17 (5th ed. 1993).

10. The Board agrees with DPS that under Section 59-C-1.327.a the Appellants must meet both tests for height in order to obtain a building permit. As we have found that the proposed structure is more than 2½ stories, we conclude that it does not meet the height limitation of Section 59-C-1.327.a. Building Permit No. 284827 was therefore properly revoked.

11. The appeal in Case A-5873 is **DENIED**.

On a motion by Vice-Chair Donna L. Barron, seconded by Member Louise L. Mayer, and Chairman Donald H. Spence, Member Allison Ishihara Fultz, and Member Angelo M. Caputo in agreement, the Board voted 5 to 0 to deny the appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

_____

Donald H. Spence, Jr.

Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 21st day of November 2003.

_____
Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County on accordance with the Maryland Rules of Procedure.